

Third Party Litigation Funding

The Dark Money Driving High-Stakes Litigation

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Third Party Litigation Funding: The Dark Money Driving High-Stakes Litigation



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INTRODUCTION

What Is Third Party Litigation Funding?

- Third parties pay money to a plaintiff or his/her counsel in exchange for a contingent interest in any proceeds from a lawsuit

- **Key Features:**



Non-Recourse: If the plaintiff does not recover any money, no money is owed

A Gamble: Strangers betting on the outcome of lawsuits



Secret: Agreements are not typically subject to full disclosure and often are not obtainable through discovery



Many Variations: There are increasingly diverse forms of funding



Forms of Litigation Funding



Consumer Litigation



Commercial Litigation

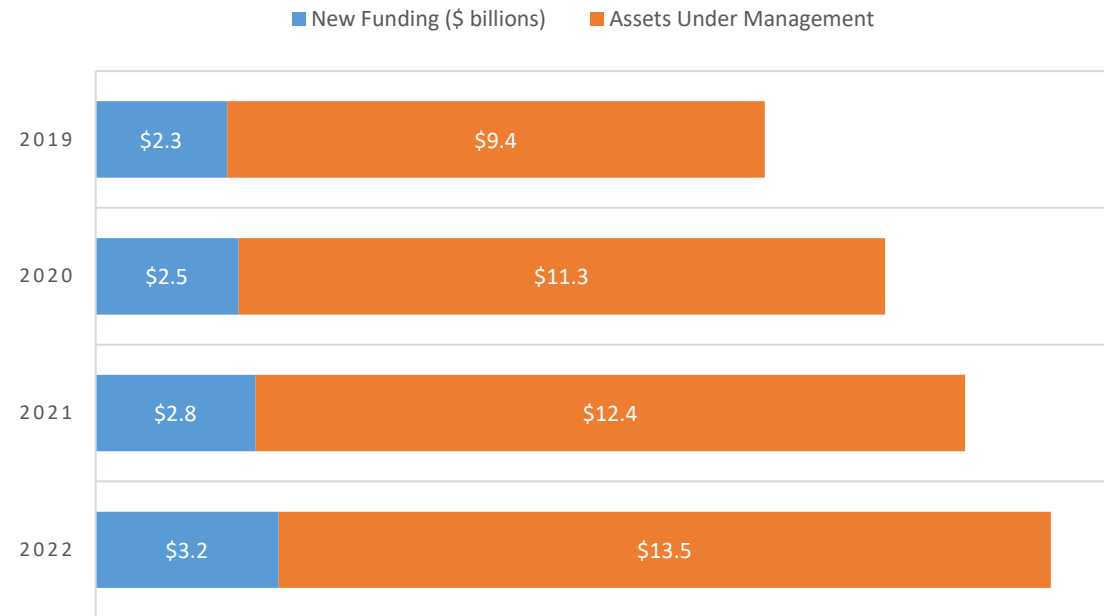


Portfolio Investing



RAPID GROWTH OF TPLF

COMMERCIAL LITIGATION FUNDING BY MAJOR DEDICATED LENDERS



Westfleet Advisors, 2021 and 2022 Litigation Finance Market Reports

TPLF MASS TORT LITIGATION PLAYBOOK





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Third Party Litigation Funding: The *Dark Money* Driving High-Stakes Litigation

- How TPLF Arrived

- US Litigation Issues



- Where TPLF May Be Headed

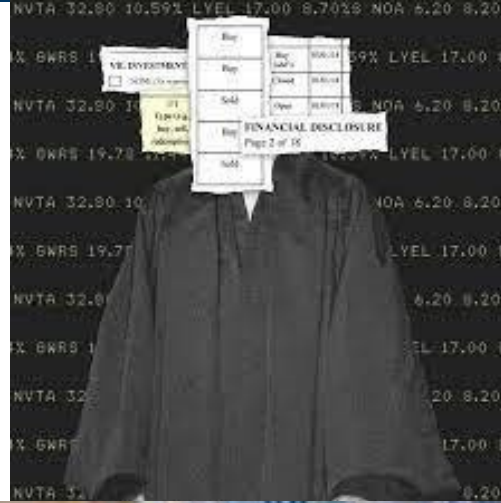
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How TPLF Arrived



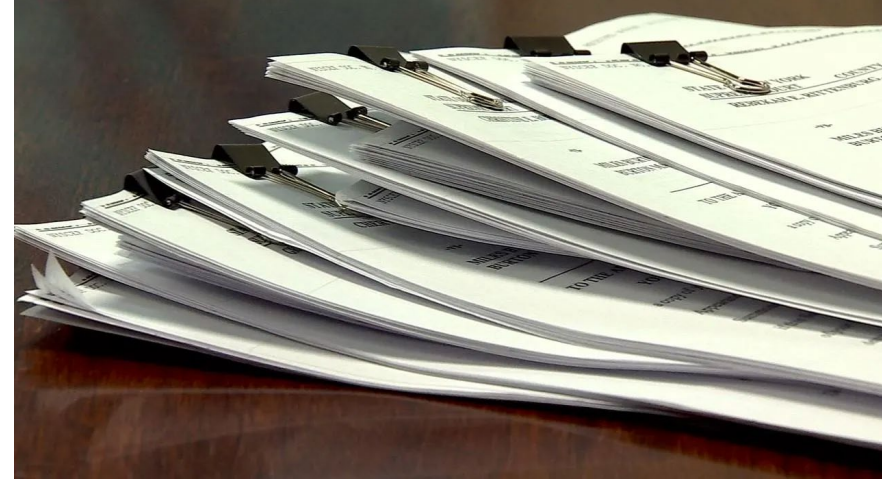
US Litigation Issues – “The Four Cs”

- Conflicts
- Control
- Costs
- Confidentiality



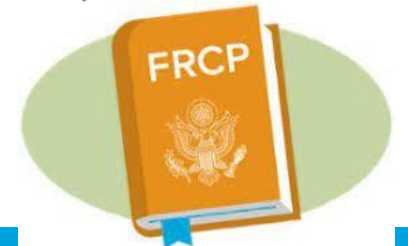
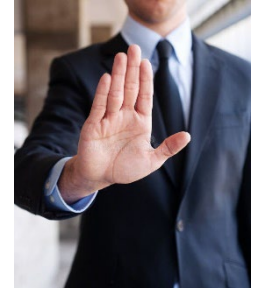
US Litigation Issues – Practical Problems

- Bloats Litigation
- Complicates Endgame
- Boomerang Effect of Reinvestment



Where TPLF May Be Heading

- Increased Congressional Scrutiny
- “Self Regulation” Proposals/State Bars
- LCJ’s “*Ask About TPLF*” Campaign
- Federal Civil Rules Advisory Committee





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Historical Background – Canada

- Litigation funding, like contingency fee arrangements, was traditionally seen as violating the doctrines of champerty and maintenance:
 - **Maintenance** – When someone, for an improper motive, becomes involved with litigation of others in which the maintainer has no interest and where the assistance he or she renders is without justification or excuse.
 - **Champerty** – An “egregious” form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation.
- *Class Proceedings Act, 1992* expressly permitted and regulated contingency fee arrangements for class actions.
- In 2002, the Court of Appeal for Ontario held that contingency fee arrangements were not necessarily champertous. (*McIntyre Estate v. Ontario (Attorney General)*, 2002 CarswellOnt 2880)
- Starting in 2009, a series of Ontario cases paved the way for the legalization of litigation funding agreements (LFAs) in Canada.
- By 2018, it was considered “settled law” that LFAs were not just legal, but constituted a legitimate means of promoting access to justice. (*Marriott v General Motors of Canada Company*, 2018 ONSC 2535)

Litigation Funding in Canadian Class Actions

Plaintiffs must obtain court approval for litigation funding in class actions.

For LFA approval:

1. The agreement must be necessary in order to provide access to justice;
2. The access to justice facilitated by the third-party funding agreement must be substantively meaningful;
3. The agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants;
4. The third-party funder must not be overcompensated for assuming the risks of an adverse costs award; and
5. The third-party funding agreement must not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's professional judgment and carriage of the litigation.

Court must also be satisfied that (i) the procedural requirements have been met (*e.g.*, prompt disclosure); and (ii) the LFA is not otherwise illegal. (*Houle v St. Jude Medical*)

Litigation Funding in Canadian Class Actions

Common Characteristics of Court-Approved LFAs:

- Litigation funder and class counsel not entitled to more than 30-35% of proceeds.
 - Approval more straightforward where compensation to third-party funder is less than the 10% levy of the Class Proceedings Fund.
- Order of disbursement should protect plaintiff interests – typically: (i) reimbursement of funder capital; (ii) payment of a stipulated amount to class; (iii) remainder split between funder/class counsel and class.
- Funder should anticipate agreeing to pay security for costs and adverse costs up to confidential maximum.
- Ultimate returns of litigation funder and class counsel will be subject to final approval by courts pending the resolution of the dispute.
- Returns should be proportionate to risk.

Litigation Funding in Canadian Class Actions

Common Reasons for Court Refusal or Modification of LFA:

- Unreasonable returns for litigation funder and class counsel:
 - *E.g.*, Proposed LFA entitled the funder to 35% of proceeds up to \$30M, 25% of proceeds between \$30M and \$60M, and 15% of proceeds in excess of \$60M. (*Ingarra v Dye & Durham Limited*, 2024 FC 152)
- Existence and terms of LFA not promptly disclosed to court.
- Potential cost to plaintiffs exceeds the 10% uncapped levy of the Ontario Class Proceedings Fund.
- Returns not proportionate to risk assumed by litigation funder.

Litigation Funding in Canadian Commercial Litigation

Court approval **may not be required** for third party funding of commercial litigation (in the Federal Court, at least).

“The Defendant has no legitimate interest in enquiring into the reasonability, legality or validity of [the Plaintiff’s] financial agreements, its counsel’s fee structure or the manner in which [the Plaintiff] chooses to allocate the risks and potential returns of the litigation, because they do not affect or determine the validity of the rights asserted by [the Plaintiff] in this action.”
(*Seedling Life Science Ventures LLC v Pfizer Canada Inc.*, 2017 FC 826)

- But courts presented with proposed LFAs in the commercial litigation context may still exercise their discretion to refuse to approve the LFA
(*Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215)

Big Picture: Litigation Funding in the Canadian Context

Key Distinctions from US Experience:

- Canadian “loser pays” system (with some exceptions in class actions) increases funder risk and decreases incentive to fund frivolous claims – increases need for up-front funder diligence.
- Outsize jury awards and punitive damages awards not a feature of the Canadian civil litigation landscape – funder expectations not based on large upside speculation.
- Mass tort proceedings still relatively uncommon.
- Stronger constraints on the discovery process designed to limit abuse.
- Clear judicial oversight requirements in the class actions context require immediate disclosure and court approval.



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TPLF PRESENTATION SUMMARY

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- **Financial Incentives Involved in TPLF**

- The Economics of Investment
- Portfolio Funding, Risk Spreading, Diversification, and the Effects of Each on Investment Vehicle (i.e. cases) Selection and Disposition
- Logical Demands for Control
- No Widgets Produced / No Services Provided
- Lessons from the Study of Political Economy: Long-Term Investment in Growing Breadth of Liability

- **The Need to Maintain a Civil Justice System Outside the Market**
 - Features of Civil Justice
 - What Functions does a Civil Justice System Serve?
 - How Markets are Enhanced by a Reliable Civil Justice System
 - Crowding Out Traditional Functions
 - Unintended Consequences for “Access to Justice”



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- **Black Box**
 - Known Unknowns
 - Unknown Unknowns
 - Limits on Research /
Benefits of Disclosure on Research Opportunities
 - LEC Response to Limited Research

- **Lack of Disclosure's Effects on Courts**

- Judges Do Not Know What They Do Not Know
- Judges Cannot Protect Litigants
- Judges Cannot Assure Themselves of Own Ethics / Parties Cannot Assess Judge's Potential Conflicts

- **Lack of Disclosure's Effects on Courts (cont.)**
 - Judges Cannot Perform Core Functions Under Civil Rules
 - Judges and Parties Cannot Assess Conflicts of Witnesses
 - Settlement Dynamics
 - Presence of Illegitimate Outside Influencers Cannot Be Detected



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- **Judges Authority to Demand Disclosure and Police Funding**
 - Inherent Authority
 - Authority Under Civil Rules
 - Local Rules & Standing Orders
 - State and Federal Legislation Authorizing or Mandating Judicial Oversight
- **Lawyer's Power to Request Judicial Intervention on TPLF**
- **The Pressing Need for Judicial Education & the LEC's Role**

QUESTIONS?

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